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IN THE

Supreme Court of the United States

October Term, 1965

No. 327

WILLIAM BUCK,

Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of California.

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Respondent.

Petition for Writ of Certiorari to the Supreme Court of California.

To the Honorable Chief Justice Earl Warren and to the Honorable Associate Justices of the Supreme Court to the United States:

Petitioner respectfully prays a Writ of Certiorari be issued to review the judgment of the Supreme Court of California entered in the above entitled case on April 6, 1965, denying review of the decision of the California District Court of Appeal, denying a Writ of Prohibition.

Opinions Below.

The decision of the Supreme Court of California (Appendix C *infra* page 13) is reported in 232 A.C.A. 217, without opinion. The unanimous opinion of the California District Court of Appeal, Fourth Appellate District, on rehearing, denying petitioner's prayer for a

Writ of Prohibition and withdrawing its earlier unanimous ruling that a writ issue in part as reported in 232 A.C.A. 217. (Appendix C, *infra* pages 14-25) The opinion of the California District Court of Appeal, Fourth Appellate District unanimously granting a Writ of Prohibiton in part is reported in 231 A.C.A. 407. (Appendix C *infra* pages 26-32).

Jurisdiction.

The judgment of the Supreme Court of California, (Appendix C, *infra* page 13) was entered on April 6, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

Questions Presented.

I.

Whether under the circumstances of this case, the charge of grand theft under California Penal Code, Sections 484 and 487, the minimum jurisdictional amount of which is $200, fulfills the due process guarantees of the Fourteenth Amendment by giving to the defendant reasonable and adequate notice that the obtaining by deception of a Trust Deed which is merely security incidental to an admittedly just and honest debt and which concededly has absolutely no value, constitutes the commission of the crime proscribed in the above penal statutes, for which the state seeks to compel the defendant to the rigor, hardship and expense of a trial?

II.

Whether consistently with the due process guarantees of the Fourteenth Amendment a state may make criminal the act of obtaining a signature on a Trust Deed in the absence of knowledge by the signator of the

nature of the document he is signing when the defendant who obtains the signature has made no representations as to the nature of the instrument being signed, and when, although, the subject of Trust Deeds has not been discussed, the signatoree has bound himself by a written agreement voluntarily entered into, to execute such an instrument, the Trust Deed being merely incidental to and security for a fair and just contract to provide labor and materials?

III.

Whether consistently with the due process guarantees of the Fourteenth Amendment a defendant who has allegedly obtained by deception a signature on a Deed of Trust which is merely security incidental to a just and honest debt and which standing alone is concededly valueless, can be compelled by the state to the rigor, hardship and expense of a trial for forgery under a California Penal Code Section 470?

Constitutional and Statutory Provisions Involved.

The constitutional and statutory provisions involved, to wit: Section 1 of the Fourteenth Amendment of the Constitution, California Penal Code, Section 484, California Penal Code, Section 487, and California Penal Code, Section 470, are set forth in the Appendix A *infra*, pages 1-2.

Statement.

On or about the 23rd day of June, 1964, the Petitioner was arrested and accused of violations of Sections 484 and 487 of the Penal Code of the State of California, which embody the crimes respectively of theft and grand theft. Thereafter, commencing on the

14th day of July, 1964, the preliminary hearing was held on such charges in the Municipal Court of the Anaheim—Fullerton Judicial District, County of Orange, State of California. Said preliminary hearing proceeded over a three-day period, on the 14th day of July, 1964, and on the 16th day of July, 1964, and completing on the 3rd day of August, 1964. At such time hereafter as reference may be made to a Reporter's Transcript, for convenience purposes, inasmuch as there are in effect three separate transcripts of said preliminary hearing bearing similar numbering, when reference is made to the transcript of July 14, 1964, the abbreviation will be "Rep. Tr." will be followed by "I", when reference is made to the transcript of July 16, 1964, the designation will be followed by a "II;" and when the transcript of August 3, 1964, may be referred to, its designation shall be followed by a "III". The petitioner was held to answer the charges and bound over the Superior Court, as the result of the ruling of the Municipal Court on the 3rd day of August, 1964. (Appendix C, *infra* page 11.)

Throughout said preliminary hearing, petitioner's counsel urged that the conduct and acts of the petitioner as described in the evidence presented at said hearing did not constitute a crime encompassed in any presently existing penal statute in the State of California, and more particularly that California Penal Code Sections 484 and 487 did not give reasonable notice to the petitioner that his acts and conduct came within the purview and boundaries of said Penal Statutes. [Rep. Tr. II; p. 97, lines 13-26; p. 100, lines 4-12; p. 103, lines 20-26; p. 104, lines 1-12 and 17-25; Rep. Tr. III, p. 5, lines 17-26; p. 6, lines 1-8; p. 8,

lines 10-14; p. 12, lines 9-10; p. 13, lines 8-12 and 15-22; p. 14, lines 1-6.] Thereafter, petitioner moved the respondent Superior Court of the State of California in and for the County of Orange, at Department 2 of said Court, in accordance with the provisions of Section 995, subdivision 2 of the California Penal Code, to set aside the information against him on the ground that said defendant, petitioner herein had been committed, accused and charged without reasonable or probable cause. That said Superior Court denied petitioner's motion on the 25th day of September, 1964. (Appendix C, *infra* page 12.) At the time petitioner made his motion to set aside the information against him, said information had been amended to include two additional counts charging petitioner with the commission of the crime of forgery in violation of Section 470 of the California Penal Code. Thereafter, petitioner filed a petition for a writ of prohibition against the Superior Court of Orange County under California Penal Code Section 999 A, "to prevent that court proceeding under the information filed". Following the hearing on petitioner's writ for prohibition, the District Court of Appeal, Appellate District, on December 17, 1964, decided unanimously in an opinion, reported in 231 A.C.A. 407 (Appendix C, *infra* pages 26-32) that the writ was to be granted as to the two counts of theft contained in the information, and denied as to the remaining two counts of forgery. Thereafter, upon petition for rehearing filed by the respondent, the District Court of Appeal on February 9, 1965, unanimously, though not by the same three justices, in an opinion reported in 232 A.C.A. 217 (Appendix C, *infra* pages 14-25) reversed itself and denied the writ of prohibition as to all four counts in the information. Petitioner's peti-

tion to the California Supreme Court to review the decision of the District Court of Appeal and was denied on April 6, 1965 (Appendix C, *infra*, page 13).

Material Facts.

Petitioner is an aluminum siding salesman. The charges here arose out of two separate sales of siding made by him. One sale was to a Mr. and Mrs. May, the other to a Mr. and Mrs. Whorley. In each sale, petitioner alleged to have produced for signature of the parties a sheath of forms consisting of white top copy, under which there was a pink copy and a yellow copy, all separated by carbon paper. The fourth and bottom paper, apparently a deed of trust form, was not separated from the third (yellow) copy by carbon paper. The top sheet contained the caption, "Lien Contract" and "Do Not Record." Just below this, in bracketed bold type, appears, among other admonitions, the following: "Notice to the Buyer; (1) Do Not Sign This Agreement Before You Read It or If It contains any blank space." Below this, in smaller type in the body of the instrument, appears this language: ". . . In addition to any other right or remedy given to the holder hereof, the undersigned hereby grants to the holder hereof a deed of trust to the above described real property as security for the faithful performance of his, her or their obligation under this contract." Furthermore, there appears above the signature line in bold black letters, the following letters: "The Buyer Acknowledges that He, She or They Has Or Have Read and Received a Completed Legible Copy Of This Contract."

It appears that the question of the obligations being secured by deeds of trust on the respective properties

was discussed by petitioner with the Mays but *not* with the Whorleys. The Mays told petitioner that they wanted no mortgage or trust deed encumbering their property and they received petitioner's assurance that there would be none. The Whorleys were not advised that they were signing a deed of trust but that a deed of trust would be recorded against their property. The matter was not discussed by the petitioner with the Whorleys. It seems, however, that both the Mays and the Whorleys read and examined their respective "Lien Contracts" and did not question or object to any of the terms or provisions contained therein. However, after the Mays and the Whorleys had signed on the top sheet of their respective "Lien Contract", petitioner apparently pushed up the bottom of the top three sheets and should read push the bottom of the first three sheets up, exposing only the bottom of the fourth or last sheet which the parties were asked by petitioner to sign and did sign without seeing or attempting to see what appeared thereon above their signatures. It is *charged* that this last sheet was a deed of trust, the blanks of which had not been filled in at the time, but were subsequently filled in by typewriter after the victims had been tricked into signing them, although it was shown that the petitioner did not have a typewriter. The blanks on the lien contract forms however, were filled in in handwriting at the time of the signing. It is apparent that the record fails to disclose any link connecting the petitioner to the filling in and completion of the deeds of trust. [Rep. Tr. I, p. 12, lines 1-14; p. 60, lines 20-25; Rep. Tr. II, p. 100, lines 14-26; p. 101, lines 1-2; p. 101, lines 22-26; p. 102, lines 1-20.]

Petitioner maintained that even admitting for the sake of argument purposes only that the alleged victims were tricked into signing the deeds of trust, this would not constitute theft under the provisions of Penal Code Sections 484, 487, for the reason that the instrument itself, which was the object obtained through the trickery, had no ascertainable value within the meaning of those Code Sections. Respondent concedes that the value of the physical deed of trust instrument itself is negligible and that obtaining a trust deed by false pretenses is not grand theft.

Reasons for Granting the Writ.

I.

It is fundamental to our constitutional system that one charged with the commission of a crime must have had reasonable and adequate notice by the terms of the statute under which he stands accused that his conduct was prohibited by that penal enactment. The applicable California Penal Statutes involved in this case, Penal Code Sections 484 and 487 expressly and specifically provide that in order to fall within the framework of grand theft, money, labor or real or personal property of a value exceeding $200 must have been taken. Clearly, the item which the State contends that petitioner stole or which was the subject of the theft, a deed of trust, is not a thing of value *per se,* nor does it have any ascertainable value within the terms of Section 487 of California Penal Code. In fact, the deeds of trust herein involved to which no recourse was taken, were merely incidental to and security for contracts of labor and materials, voluntarily bargained for, which completely met with the satisfaction and approval of the parties involved.

First:

It is the contention of the petitioner that a deed of trust, is nothing more than a security device, in the nature of a mortgage, given as security for a payment of a just obligation or a debt, having in and of itself no value to its holder and certainly no ascertainable monetary value. A deed on trust, such as one that is present in this case, cannot be considered as "property" within the meaning and spirit of California Penal Code Section 484. Further, such a deed of trust can have no ascertainable extrinsic or monetary value, so as to fulfill the requirements of California Penal Code Section 487 in that, according to that section, the deed of trust itself must have a monetary value exceeding $200. It should be noted here, that we must consider sections 484 and 487 together and, therefore, the deeds of trust in question must not only qualify as "property" within section 484, but also for the purposes of this case, must further be found to have a monetary value in excess of $200. It should be further noted that for the purpose of this case it will make no difference whether or not the deeds of trust were obtained by fraudulent and unlawful means or obtained completely within the bounds of the law and by legal means.

The California courts have long held that a trust deed, like a mortgage, is merely a security mechanism, having no worth or ascertainable value in and of itself, standing aside from the debt or obligation it secures. In the case of *Wyser v. Truitt,* 95 Cal. App. 727, the court held that:

"A deed of trust has no market or ascertainable value, apart from the obligation it secures.

A trust deed merely hypothecates legal title and does not divest the trustor of his ownership in the property."

The court in the case of *Bank of America v. Bank of Amador County,* 135 Cal. App. 714 stated that:

"A trust deed is essentially a security."

A trust deed standing alone has no extrinsic value. The trust deed is merely an ancillary device with the sole purpose of securing a debt. In order for this device to come into play, there must be a legally enforceable existing debt. When the debt is extinguished so too is the deed of trust. The deed of trust adds no additional value to the amount or the validity of the debt. Thus, the procurement of a deed of trust, whether obtained by legal means or by fraudulent means, gives nothing more to its holder than he already had. Petitioner submits therefore, that his actions in this case have not procured for him anything that would fall within the meaning and requirements of California Penal Code Sections 484 and 487. In fact, the respondent in their "Return to Order to Show Cause and Response to Petition for Writ of Prohibition", at p. 24, lines 4 through 6 therein concede that such an instrument obtained by fraud has no value and therefore cannot be the subject of theft.

Second:

The position of the respondent, can be summed up rather succinctly. The respondent contends that it is the law of the State of California that if one is induced into a contract by false pretenses, which relates solely and specifically to securing of the obligation which is otherwise agreed upon as part of the exact and the entire bar-

gain, that the entire bargain is tainted by the false pretense and that the individual involved in fact does not receive that which he "bargained for", and that the perpetrator of the false pretense is in fact therefore guilty of theft. Petitioner contends that such a position is an absolute distortion of logic. The question is peculiar inasmuch as there is no specific criminal case authority on this very topic. It is apparent from the transcripts of the preliminary hearing that the alleged victims were in no way contending that they were cheated or deceived out of funds, properties or assets. In the instances at hand, the alleged victims made it obviously clear to the lower court that they received full value for their money, that they "got what they bargained for", that they were satisfied with the work, labor and materials, and that from a monetary point of view they had lost absolutely nothing. In fact, each of the alleged victims expressed their desire, willingness and intent to pay the obligations incurred by virtue of the contracts entered into. The obligation for the payment by the alleged victims was evidenced by a document introduced into evidence known and referred to as a "Lien Contract". There is nothing in the transcript to indicate that the parties were not fully cognizant of that which was set forth in their respective contracts. Thus, even assuming that petitioner made representations to one of the contracting parties that no trust deed would be involved in the transaction, it is arguable that the contracting party should be bound by his intent expressed at the time of executing the contract after he had read it. Respondent relies on his contention that it is a crime for one to obtain by deceptive means, the security for a just and honest debt. However, even if it be conceded for argument purposes only, that the signatures on the

trust deeds were obtained by fraudulent means, it is the basic contention of the petitioner that a debt relating to the acquisition of labor and materials by the alleged victims for which they were and are paying an agreed, satisfactory, just, fair and honest price, cannot, possibly be construed that the petitioner has committed any crime or offense. A deed of trust *per se* has no value whatsoever. It cannot be measured in terms of dollar amount. The deed of trust itself is simply a security device, giving to the holder no additional monies or property other than that which he already has by the principal obligation itself. By acquiring the deed of trust the petitioner can be said to have gained nothing which he did not already have and thus petitioner submits that the parties did in fact get "all they had bargained for".

The testimony of the alleged victims at the preliminary hearing bears out petitioners' argument that the alleged victims received all they bargained for, at prices intended, and that they were satisfied with the work.

Petitioner refers to the following portions of the transcripts of the preliminary hearing:

Mr. Cecil R. May testified at Rep. Tr. 1, page 16, lines 18-22:

> "Q. Now, was the aluminum siding you contracted for put on your house? A. Yes.
>
> Q. Was the room addition put on your house? A. Yes."

The same witness then made it perfectly clear that he received that which he contracted for when he testified at Rep. Tr. I, page 38, lines 1-9:

> "Q. All right. Now, in reality you received the aluminum siding that you contracted for, did you not? A. Yes.

Q. And in reality you received the room that you contracted for, even though you have told us that you were dissatisfied with the way some of the work had been completed? A. Well, the room was put on, you can see the room was put on there and the siding is on there."

Again, the same witness, referring to the construction company for which the defendant was a salesman and insofar as indicating a completion and satisfaction testified at Rep. Tr. I, page 44, lines 1-7:

"Q. And then I show you the second document which bears the date May 12th, 1964, and appears to have a signature Cecil R. May, which says 'Completion of Adjustment,' which indicates that you have certified that the adjustments previously agreed upon have been made. A. They have, but nothing concerning Mr. Williams, I was talking about Mr. Williams. I haven't seen him."

When Mrs. May testified on the 16th of July, 1964, she again reaffirmed her husband's satisfaction as well as hers with the work and services performed, when at Rep. Tr. II, page 20, lines 12-21, she testified:

"Q. All of these items that you were concerned about were corrected to your satisfaction sometime during 1964, were they not? A. They were corrected to my husband's satisfaction.

Q. Not to yours? A. Well, my satisfaction is his satisfaction.

Q. So that they were therefore corrected to your satisfaction? A. Yes."

As to Mr. and Mrs. Whorley, the similar circumstances were likewise true insofar as their satisfaction

with the work, materials and the obligation itself, as was borne out by the testimony of Mrs. Whorley.

Mrs. Whorley testified on July 16, 1964, that she got what she bargained for, that she was satisfied with the amount and that she intended to pay it. This testimony commences at Rep. Tr. II, page 79, lines 15-23:

> "Q. So you really got everything you bargained for? A. Bargained—
>
> Q. Well, this is a legal phrase.
>
> Possibly I should say you got what you wanted. You wanted aluminum siding and you wanted the $750 to pay off the house and the furniture? A. We didn't ask for it. He suggested it.
>
> Q. But you got these things? A. Yes, we got them."

The entire issue which is being brought before this Court was brought forth at the time of Mrs. Whorley's testimony and was evident and is evident from the Reporter's Transcript in that respect, the question being that neither the Mays nor the Whorleys were dissatisfied in any respect with the debt, the obligation, the work, labor or services, the amount, or the terms, but that their contention was solely that they were tricked into signing a deed of trust to secure the just debt. In this connection, Mrs. Whorley testified at Rep. Tr. II, page 81, lines 25-26, and page 82, lines 1-26 and page 83, lines 1-8:

> "Q. That's the only thing that you object to, that you didn't know about it? A. That's right.
>
> You don't object to securing your debts; you feel that it's just and proper that—people should

pay their debts, and if they can secure them, they should secure them.

Mr. Dickerson: I'm going to object.

Mr. Trope: That goes to the heart of the issue.

The Court: Sustained. Objection sustained.

By Mr. Trope: Q. Do you see anything objectionable or can you tell me if there is anything objectionable in your mind to secure a debt? A. Well, if you've got a debt, I believe you should pay it if you owe it.

Q. Right. And you do owe this debt? A. And we intend to pay it.

Q. And you have said that your only objection is not that you've had it secured, or had had to secure a debt, but that you didn't know you were securing it at the time. A. Well, we didn't know it.

Q. You didn't know you were securing it? A. I guess, if that's what you mean. I don't know for sure.

Q. But as it's turned out, the debt is a secured debt. Could you tell me in what way you've been injured, or victimized? A. Well—

Q. What have you lost? A. Just finding out about this third mortgage, and to our knowledge, we didn't know about it—

Q. I see. A. —is all I know.

Q. The District Attorney contacted you, did he not? A. That's right."

In analyzing the respondents' position that the contracting parties did not receive what they had "bargained for", one must first look to the civil elements of a contract. As is set forth in California Civil Code Section

1550, as well as Restatement of Contracts, Section 19, "It is essential to the existence of a contract that there should be:

(1) Parties capable of contracting;

(2) Their consent;

(3) A lawful object; and

(4) A sufficient cause or consideration."

No where therein contained is there any reference to the securing of the consideration for the contract, nor the securing of sums due from one party to the other. The Petitioner respectfully contends that a valid and proper "bargain" and contract may be made and entered into, being just, fair and proper, without any relationship whatsoever to the giving of security for the debt incurred. In light of the Respondents' concession that the deed of trust itself could not be the subject of a theft, the argument that it is included as part of the "bargain" goes beyond reason. The alleged victims, as is contended, did not "bargain for" an unsecured or a secured debt. The alleged victims bargained for a debt in return for certain labor and material. The alleged victims incurred the debt in the amount agreed upon and received the labor and materials agreed upon. Coincidentally, the debt became secured and whether by false pretenses or not, the securing of a just and honest debt can hardly be construed without straying from logical reason, as denying to the alleged victims that which they have "bargained for".

To say that one who has incurred a just and honest debt in exchange for labor and materials to the exact extent bargained for has been the victim of theft, simply because said individual has by some means or other

been induced into the time-honored practice of securing his debt, is almost to say that one seeking to avoid his responsibilities by the avoidance of a secured debt in preference for an unsecured debt, is but to contend that the bargain was only entered into on the consideration that the debt which would be incurred as a result of the "bargain" would be unsecured. Logic and reason tell us, as does the Restatement of Contracts and California Civil Code Section 1550, that a contract and bargain is not made in consideration of whether or not the debt incurred will be secured or unsecured, but is made and based upon that which the individuals involved *actually and truly* bargained for. The question of security is truly secondary to the bargain itself and is not a part of the bargain, but simply secures to one of the parties to the bargain a certain amount of assurance that the other party to the bargain will in fact pay the consideration agreed upon.

Third:

It is your petitioners' contention that inasmuch as the respective debts incurred by the Mays and the Whorleys were justly, fairly and honestly incurred and the evidence of the debt, the "Lien Contract," fairly and honestly shown and signed, and even if we are to assume that a trust deed securing that just and fair debt was obtained by trick and device, that the obtaining of such deed of trust does not constitute any offense under the Penal Statutes of the State of California and certainly not a violation of Penal Code, Sections 487 or 484. Petitioner submits that from a moral point of view it is not "right" to trick or deceive in any instances of social or business relationship between people. The Petitioner does not admit that he

tricked or deceived anyone into signing the respective deeds of trust. In fact, petitioner contends to the contrary. However, for argument purposes and for the purposes of this petition we are assuming such to be the case. Regardless of how morally "wrong", such conduct does in no conceivable manner or form constitute an offense under our presently constituted penal laws. Petitioner contends and alleges that the District Attorney in the two specific instances at hand sought out the alleged victims. Petitioner also contends and alleges that the District Attorney of Orange County at the present time is in the process of bringing to trial or attempting to bring to trial a number of cases of similar facts and situations. Petitioner contends that this is possibly a *testing process* by the Office of the District Attorney of Orange County. However, it is petitioner's contention that only the State Legislature has the authority to encompass a new act into a crime, by legislative enactment.

This court has long jealously guarded the right of every individual charged with a crime to be reasonably apprised of the acts and conduct which are proscribed by the terms of the accusatory statute as a condition precedent to any enforcement action by the state authorities. In this instance the state enforcement authorities are attempting to take a reasonably clear criminal statute and attribute to it an expanded scope, unreasonable in its application to this petitioner, in an effort to bring petitioner's conduct and actions within the proscribed boundaries.

> "The vice of vagueness in criminal statutes is the treachery they conceal in determining what persons are included or what acts are prohibited." *United States v. Cardiff*, 344 U.S. 174.

"A penal statute must set up ascertainable standards so that men of common intelligence are not required to guess at its meaning, either as to persons within the scope of the act or as to the applicable test to ascertain guilt." *Winters v. New York,* 333 U.S. 507.

"In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged." *United States v. National Dairy Products Corp.,* 372 U.S. 29. *Robinson v. United States,* 324 U.S. 282.

Petitioner contends that had the Legislature of the State of California intended that there be crime known as "commercial false pretenses", they could simply by enactment of legislation make it unlawful in the State of California for any person, while engaging in commerce, to lie to another about the nature or elements of their commercial dealings. In the absence of such an enactment it is totally illogical and unreasonable to charge petitioner with notice that a false representation wholly unrelated to the essence of the bargain itself, especially where the alleged victim receives materially everything he bargained for, at the price he bargained for, can be the basis of criminal sanctions.

To allow the present opinion of the District Court of Appeal to remain in effect, one would have to conclude that in conducting any commercial transactions, any fabrication, lie or false pretense, whether by commission or omission of either party, would constitute theft. If the State Legislature intended to punish such conduct, the enactment of criminal statutes reasonably calculated to notify the public that such conduct is prohibited would be relatively simple.

II.

In order for Petitioner to have committed a crime within the purview Penal Code Sections 484 and 487, it is necessary that he had deprived the alleged victims of something to which he was not entitled and had done so with fraudulent intent. Petitioner contends that in the case of the Whorley transaction, he was entitled to the execution of the trust deed by virtue of the "Lien Contract" to which the Whorleys had expressly assented. Petitioner further submits that his failure to make any statement with reference to the trust deed cannot be in any circumstances construed as a criminal act in light of the Whorley's prior examination and assent to the contract. Any construction of Penal Code Sections 484 and 487 which impose an affirmative duty upon petitioner to verbally discuss the trust deed, in light of these circumstances, places an unreasonable burden upon petitioner to attribute to these penal statutes a reasonable interpretation and construction.

First:

On the face of the lien contract, under the heading "Terms of This Contract" appears the following sentence:

> "In addition to any right or remedy given to the holder hereof, the undersigned hereby grants to the holder hereof, a deed of trust to the above described real property as security for the faithful performance of his, her or their obligation under this contract."

Furthermore, immediately above the buyer's signature, in bold, black letters, appears the following sentence:

> "The buyer acknowledges that he, she or they has or have read, and received a completed legible copy of this contract."

The only reasonable reference to be drawn from the execution of this contract by the Whorleys is that they were or should have been apprised of the fact that they were granting to the holder of the lien contract a deed of trust on their property. Thus, petitioner submits, that at the time the contract was executed he was entitled to assume that unless any of the terms of the contract were questioned, that the buyers understood and assented to all the terms including the provision to execute a deed of trust. Petitioner, therefore, had a right eminating from the contract itself to specifically enforce that provision and secure from the buyers the execution of a deed of trust. Since petitioner could legally compel the execution of the deed of trust, petitioner submits that his acquisition of the signatures on the deed of trust, under the circumstances of this case, cannot be in any way construed as the commission of a crime.

Second:

It is elemental in the law, that one cannot be bound by the secret intent of another. It certainly cannot be said that petitioner had the duty to anticipate what prospective buyers may be thinking, or that petitioner is obligated to read their minds. The absence of any protest or questions by the Whorleys after they had read the lien contract could only reasonably lead the petitioner to assume that they voluntarily assented to the execution of the deed of trust.

Third:

The respondent points out that the subject of a trust deed being recorded against the Whorley property was never discussed between the Whorley's and the petitioner. The respondent contended below that since the transaction would result in a trust deed being placed upon the Whorley property, and since the petitioner did not orally and verbally inform the Whorley's that such a result would follow, that petitioner is guilty of concealing a material fact and such concealment, constitutes fraud. This construction of the applicable statutes contended for by respondent clearly places an unreasonable burden upon petitioner to anticipate the necessity for verbal discussion of each and every provision of a written contract entered into during the course of his daily affairs. It is submitted, that such an interpretation of Penal Code Sections 484 and 487 cannot have reasonably been anticipated by the petitioner and to bring him to trial for such conduct at this time would clearly contravene the protections guaranteed by due process. The arguments and cases cited in paragraph I THIRD above are clearly applicable to the Whorley transaction.

III.

One of the essential elements of the crime of forgery is that the instrument claimed to have been forged must on its face be capable of defrauding someone who might act upon it being genuine. Furthermore, the crime is not chargeable as to a writing which is so imperfect on its face as to be obscure without reference to extrinsic facts. In this case, the transcript is well documented with testimony to the fact that the trust deeds which were signed in the present case were signed

in blank. It is contended here that a blank trust deed, even though signed, cannot be the subject of a forgery; for such a blank trust deed is not capable on its face of defrauding someone who might act upon it as genuine. A *blank* trust deed in no way describes the amount of the obligation which it is to secure, the property which is the subject of the said deed of trust, the identity of the Trustor or the beneficiary, and furthermore, it is undated and not notarized. Such a vacant instrument does not resemble a completed trust deed and in such form cannot be said to be an adequate document for one to even mistakenly rely upon as being genuine. Therefore, such an instrument, as was signed by the alleged victims in this case, was not capable of being genuine, nor of causing one to act upon it as being genuine. The California Rule is:

> "The mere falsity of the writing is not an offense . . ." The falsified writing must be of such a nature that someone might be defrauded by acting upon it. *People v. Di Ryana,* 8 Cal. App. 333.
>
> "Like instruments that are void on their face, instruments that are by their very nature, regardless of falsity, incapable of defrauding anyone, are not the subject of legal forgery."
>
> 22 Cal. Jur. 2d, Forgery, Sec. 14;
>
> *People v. Wong, Sam,* 117 Cal. 29.
>
> "A writing that is a *nudum pactum,* a naked promise or that is otherwise void on its face, cannot be the subject of a forgery."
>
> *People v. Baender,* 68 Cal. App. 49;
>
> *People v. Staigers,* 92 Cal. App. 628;
>
> *People v. James,* 110 Cal. 155.

It is presented here that the trust deeds, as signed in this case, were not capable of being acted upon by

anyone, for a blank, but executed trust deed is incapable of being acted upon.

Furthermore, it cannot be said that petitioner was the person who filled in the deeds of trust in the instant case as there is absolutely no evidence in the reporter's transcripts connecting petitioner with anything other than obtaining the signatures on a blank deed of trust, which is in itself a nullity.

Petitioner has argued above that he was entitled to the Whorley signature on the deed of trust by virtue of their voluntary execution of the lien contract. If petitioner's argument with respect to the Whorley transaction is valid, it then follows *ipso facto* that no forgery could have been committed within the purview of California Penal Code, Section 470. Since the Whorley's were obligated to sign the trust deed, the petitioner cannot under any view of the facts be said to have "falsely made, altered, forged or counterfeited" the trust deed within the statutory language since the element of falsity is patently lacking.

To construe this criminal statute to include petitioner's act within the proscribed boundaries would be to clearly deprive Petitioner of due process of law.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

SORRELL TROPE,
EUGENE L. TROPE,
MICHAEL S. LOSHIN,
By SORRELL TROPE,
Attorneys for Petitioner.

APPENDIX A.

Constitutional and Statutory Provisions Involved.

1. The Fourteenth Amendment of the Constitution provides: Section 1, "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or communities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Section 484 of the Penal Code of the State of California, provides:

"Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person or money, labor or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and b thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or services of another, is guilty of theft. In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test, and in determining the value of services received the contract price shall be the test. If there be no contract price, the reasonable and going wage

for the service rendered shall govern. For the purposes of this section, any false and fraudulent representation or pretense made shall be treated as continuing, so as to cover any money, property or service received as a result thereof, and the complaint, information or indictment may charge that the crime was committed on any date during the particular period in question. The hiring of any additional employee or employees without advising each of them of every labor claim due and unpaid and every judgment that the employer has been unable to meet shall be prima facie evidence of intent to defraud.

3. Section 487 of the Penal Code of the State of California provides:

"Grand theft is theft committed in any of the following cases:

1. When the money, labor or real or personal property taken is of a value exceeding two hundred dollars ($200); provided, that when domestic fowls, avocados, olives, citrus or deciduous fruits, nuts and artichokes are taken of a value exceeding fifty dollars ($50); provided, further that where the money, labor, real or personal property is taken by a servant agent or employee from his principal or employer and aggregates two hundred dollars ($200) or more in any 12 consecutive month period, then the same shall constitute grand theft."

APPENDIX B.

Portions of Records Setting Forth Timely Raising of Federal Question That Petitioner Has Been Deprived of Due Process Under the Fourteenth Amendment to the Constitution in That California Penal Code Sections 484, 487 and 470 Do Not Give the Petitioner Reasonable and Adequate Notice That His Conduct in This Case Constitutes the Commission of a Crime as Prescribed by Said Penal Statutes.

Reporter's transcript of preliminary examination, July 16, 1964.

Rep. Tr. II, page 97, lines 13 through 26:

Mr. Trope: "The fact is this: 1. The entire basis and nature of this action is the type of thing that should not be permitted to go into a courtroom, I don't care in Orange County of where, if they're prosecuting 22 people for this, or 57 people for this.

I contend that if I went out at random today and picked up a phone book, or went through the County Recorder's office and called a thousand people who had second Trust Deeds on their house and said to them, 'Do you know you've got a second on your house,' that I'm bound to run across a couple of them who would seize upon this as a fantastic opportunity to gain something to which they're not entitled. The same unique situation here is that none of these people have complained about anything, or did complain."

Page 100, lines 4 through 12:

Mr. Trope: "I'm interested in my client, and I am contending that *no crime has been committed* because a Deed of Trust absolutely and clearly under the laws

of this state, is not a piece of property. It's not an asset and does not have value per say, and I am convinced that if it has to get to the point of the Supreme Court that the Supreme Court of this state will rule as it has ruled in the past. What I am interested in is stopping the expense for my client only in terms of this particular issue."

Page 103, lines 20 through 26; and page 104, lines 1 through 12:

Mr. Trope: "I assure you, your Honor, if these people, if these people had been properly informed at the inception by the, whoever contacted them from the District Attorney's office, that whatever was going on in these prosecutions would not release them of one single dime of these obligations that they would have thought twice before they would have dreamed up the idea of looking for some sort of manna from heaven, and I still contend tiat if I were, at random, to go through county records and pick out a few names of people with seconds and call them at random; I find a couple of them here and there who would be willing to say maybe there's something in it for them, and I contend that is the very nature of this thing. *Our laws weren't set up for this type of conduct.*

If the District Attorney of Orange County decides that he wants, or its office wants to go on such a crusade, then started at a different level, and *enact certain legislation* require *certain licensing, inform the public,* as to the presumed evils of buying, citing salesman, but don't go about it in this way."

Page 104, lines 17 through 25:

Mr. Trope: ". . . The Deed of Trust itself is simply a security and since both of these marital communities

taking the stand testified that they were satisfied with the contract and the amount of money, with the debt, but simply that it was secured, we cannot conceivably say that they have been deprived of anything under Section 484, nothing. The giving of security, or the reading of, my reading of 484, does not imply that the taking of security for a just debt by deceptive means is a crime."

Page 105, lines 6 through 9:

Mr. Dickerson: (The District Attorney) "Well, it appears that counsel is castigating the DA's office pretty much on the basis that we have gotten in and discovered some crime that the People didn't know about.

Transcript of Preliminary Examination, August 3, 1964.

Rep. Tr. III, page 5, lines 17 through 26, and page 6, lines 1 through 8:

Mr. Trope: "Actually they did get what they bargained for. The fact that they have to secure—or that they did secure a debt does not imply in any sense of the word that they didn't get what they bargained for, especially considering the fact that under our code section we must have some basis of determination of value as to this alleged thing that they didn't get that—of that which they bargained for.

Section 487—if we didn't have this distinction theoretically, between petty theft and grand theft we could say that the law does not impose upon us, or the legislature did not impose upon us any duty to ascertain value, because to do a certain act or to commit a certain thing or to say a certain thing would constitute an offense. But, the very existence of this determination between that which is petty theft and that which is

grand theft imposes upon the courts by the legislate the necessity to ascertain that there is the existence of something of value."

Page 8, lines 10 through 14:

Mr. Trope: "I hate to see a defendant be put to the expense of going through the process of the courts to get to a final point of having some appellate court say, "No it was not something of value." This should have never been brought to begin with."

Page 12, lines 9 through 10:

Mr. Trope: . . . "Especially on a new point like this, this isn't a tested point . . ."

Page 13, lines 8 through 12:

Mr. Trope: "What is the necessity to have the great expense by all defendants in doing this. You want to test an action to see whether you have got a good action. You get a crack in two or three of them, run those two or three through, leave us alone."

Page 13, lines 15 through 22:

Mr. Trope: "I am absolutely and utterly convinced that unless the legislature has a different meaning or enacts different legislation, that *this is not a crime*, that no crime has been committed by this man, and, to me, especially where—its obvious that there is a test going through on this, and if there is such a test let's run it to its conclusion before you go and put all these other individuals on."

Page 13, lines 25 through 26; and page 14, lines 1 through 6:

Mr. Trope: "Number one this action ought to be dismissed right now, which I really do feel it should,

or, in the alternative, if it is not, if it is not dismissed right here and now, then certainly the evidence has been so flimsy against this man that this man ought to be left to his own, shall we say, rest until such time as some resolution has been made in the eyes of the Prosecution as to *what is* or *what is not* the *law* in this *situation.*"

Reporter's Transcript dated September 25, 1964 of Motion to Set Aside the Information Pursuant to the Provisions of California Penal Code Section 995, Subdivison 2.

Page 2, lines 15 through 26; and page 3, lines 1 through 5:

Mr. Trope: . . . "I would like to take the position for arguments purpose, that assuming that my client did in fact fraudulently and through trick or devise obtain the signature of the respective individuals on the particular Deed of Trust, and not saying that this is a fact, in fact, we deny this, but I'm saying for argument purposes that let assume this to be the case that the Trust Deed itself is not an item of value, it is not an asset, it has no value and has no monetary value and has no purpose other than security, it can only secure a just and proper debt, and as a matter of fact indicates, or rather states that if the debt is no good, then the Deed of Trust is no good, and if the debt is not forceable or legal, then the Trust Deed is a useless gesture. The only purpose of the Trust Deed, your Honor, is to secure or give security to the particular debt itself."

Page 4, lines 1 through 8:

Mr. Trope: "Now, certainly, how can we say in this day and age, at least as long as the economy of our

country exists as it is, that it is a heinous crime to obtain from a person security of a just and honest debt? This is beyond comprehension to em. *It certainly is not set out in the Penal Code.* Certainly I think there is an obligation on the part of law enforcement agencies to adhere closely to the Penal Code."

Page 6, lines 24 through 26; and page 7, lines 1 through 15:

Mr. Trope: "So, we have just and honest debts. How can we say, therefore, that an offense was committed, if we assume this was obtained by trick and devise to get security for it. Just as I gave an example of my tricking Mr. Dickerson into signing the Note evidence of the very debt we had agreed upon and in this particular crime or case he may not like me and I don't say its the nicest thing in the world, but unless there is *specific statutory prohibition against this*, I cannot see where we can criticize the person who obtains security in this fashion.

Now, if I may, in terms of the factual aspects of this, for a moment, unless your Honor would like to ask me something in terms of my views respecting this particular position? Very well, as I say you have read the Memorandum and I am sure you have gone over the case, and I am surely convinced that this in itself has no value within the meaning of the code. *It is something absolutely without* value."

Page 8, lines 13 through 21:

Mr. Trope: . . . "I don't think any evidence whatsoever was brought forth at the preliminary hearing to show that anything of value was taken from these people, to show in fact that they were tricked or de-

ceived into signing these documents. Very conveniently, the people were sought out by the District Attorney's office, as brought out in the transcript, and they are sought out at a certain point, we don't know how many people the District Attorney might have contacted. Perhaps it was one hundred, . . ."

Page 10, lines 3 through 5:

Mr. Trope: "I do not see from a factual point of view that there has been any showing of any violation involved . . ."

Page 11, lines 22 through 26; and page 12, line 1:

Mr. Trope: "From the legal aspect of this, there is no value to a Deed of Trust, and certainly if there was. I will even go one step further and say, your Honor, that if there is a value to a Deed of Trust, who is it that determines how much of the value is, how do we determine whether it is worth two hundred dollars less or more?"

Page 13, lines 16 through 26:

Mr. Trope: Now, can you, or how can we place a value on it? The reason we can't place any value on it is not an—it is not an asset, it is not a thing of value, it is simply a thing of—well, it is simply a means by which an honest person, shall we say, its kept honest in the payments of his debts, and I can't possibly see why or under what circumstances even assuming, which we do not, that Mr. Buck obtained signatures on those Deeds of Trust, by trick or devise, that this crime is any more a crime than had I tricked Mr. Dickerson into signing my personal Note."

Page 14, lines 14 through 20:

Mr. Trope: "Now, once the debt is there, once the debt exists and it is a just and honest debt, the way the law is presently constituted, if you are to obtain a security for this just and honest debt, that is due you for security, that fraudulent trick or devise is not a crime. That is, *because of the construction of the Penal Code,* because this is a thing of no value."

APPENDIX C.

Opinions of Lower Courts and Judgment to Be Reviewed.

In the Municipal Court of Anaheim-Fullerton Judicial District, County of Orange, State of California.

The People of the State of California, Plaintiff, vs. William Buck, aka Bill Williams, Defendant.

It appearing to me that—the defendant having—preliminary examination to the offense in the within complaint mentioned, Felony, to-wit: Violation of Section 484-487 of the Penal Code has been committed, and there is sufficient cause to believe the within named William Buck guilty thereof, I order that he be held to answer to the same,— Dept. Two, at Santa Ana on August 14, 1964 at 9 A.M. and that present bail is deemed sufficient, Threethousandonehundredandfifty ($3,-150.00 Inc. P.A.) Dollars, and that he be committed (3,150.00) to the Sheriff of the County of Orange until he is legally discharged.

Dated this 3rd day of August, 1964

/s/ Max V. Eliason
Judge of the
Judicial District, in the County of Orange,
State of California,
Committing Magistrate.

(Seal)

In the Superior Court of the State of California, in and for the County of Orange. Dept. 2.

Court convened at 1:30 P.M. September 25 1964, present Hon. William L. Murray, Judge; Stanford E. Shaw, Deputy Clerk; L. A. Brussow, Deputy Sheriff; Ester Resnick, Reporter; and the following proceedings were had:

C-14660 People vs. Buck.

Hearing re: motion under Section 995 Penal Code. Defendant in court with counsel, S. Trope. People represented by Joe A. Dickerson, Deputy District Attorney. Motion by the defendant under Section 995 Penal Code denied. Defendant waived reading of the Information. To the Information, defendant now pleads not guilty to the offense charged in Counts 1, 2, 3, and 4. Defendant waived statutory time for trial. Case set for trial on December 7, 1964, at 9:00 a.m. in Department 5. Defendant demands trial by jury. Bail as presently set deemed sufficient. ENTERED 9-28-64.

(Seal)

Opinion of the Supreme Court of California.

Clerk's Office, Supreme Court, 4250 State Building.
Los Angeles, California 94102, April 6, 1965.

Dear Sir: I have this day filed Order HEARING DENIED.

In re: 4 Civ. No. 7841 Buck vs. Superior Court, Orange Co.

Respectfully

William I. Sullivan
Clerk

Opinion of the District Court of Appeal. February 9, 1965.

In the District Court of Appeal, Fourth Appellate District, State of California.

William Buck, Petitioner v. The Superior Court of The State of California, Respondent. The People of the State of California, Real Party in Interest. 4 Civil No. 7841.

Filed Feb. 9, 1965.

Petition for a writ of prohibition against the Superior Court of Orange County, under Penal Code, section 999a, to prevent that court from proceeding under information filed. Writ denied.

Trope & Trope and Sorrell Trope for Petitioner.

Kenneth Williams, District Attorney of Orange County, and George J. Jeffries, Deputy District Attorney, for Respondent and Real Party in Interest.

Petitioner was arrested and charged with two counts of theft, in violation of Penal Code, sections 484 and 487. A preliminary hearing was held in the Municipal Court, Anaheim-Fullerton Judicial District, which hearing resulted in petitioner being held to answer in respondent Court. An information was filed therein by the District Attorney of Orange County, charging petitioner not only in two counts with theft, in violation of sections 484 and 487 of the Penal Code, but, in addition, also in two counts, with violation of Penal Code,

section 470 (forgery). Petitioner moved respondent Court to set aside the information pursuant to the provisions of subdivision 2 of Penal Code, section 995, to wit:

> "That the defendant had been committed without reasonable or probable cause."

This motion was denied and the case was set for trial. Petitioner seeks from this court a writ of prohibition "demanding said court to desist from any further proceedings in said action."

Petitioner is an aluminum siding salesman. The charges here arose out of two separate sales of siding made by him. One sale was to a Mr. and Mrs. May, the other to a Mr. and Mrs. Whorley. In each sale, petitioner is alleged to have produced for signature of the parties a sheaf of forms consisting of a white top copy, under which there was a pink copy and a yellow copy, all separated by carbon paper. The fourth and bottom paper, apparently a deed of trust form, was not separated from the third (yellow) copy by carbon paper. The top sheet contained the caption, "Lien Contract" and "Do Not Record." Just below this, in bracketed bold type, appears, among other admonitions, the following: "Notice to the buyer: (1) Do not sign this agreement before you read it or if it contains any blank space." Below this, in smaller type in the body of the instrument, appears this language: ". . . in addition to any other right or remedy given to the holder hereof,

the undersigned hereby grants to the holder hereof a deed of trust to the above described real property as security for the faithful performance of his, her or their obligation under this contract."

From testimony in the record, the truth of which we must assume for purposes of this decision, it appears that the question of the obligations being secured by deeds of trust on the respective properties was discussed by petitioner with the Mays but not with the Whorleys. The Mays told petitioner that they wanted no mortgage or trust deed encumbering their property and they received petitioner's assurance that there would be none. The Whorleys were not advised that they were signing a deed of trust or that a deed of trust would be recorded against their property. The matter was not discussed by petitioner with the Whorleys. It seems, however, that after the Mays and the Whorleys had signed on the top sheet of their respective "Lien Contracts," petitioner pushed the bottom of the top three sheets up, exposing only the bottom of the fourth or last sheet which the parties were asked by petitioner to sign and did sign without seeing what appeared thereon above their signatures. It is charged that this last sheet was a deed of trust, the blanks of which had not been filled in at the time but were subsequently filled in by typewriter after the victims had been tricked into signing them, whereas the blanks on the lien contract forms were filled in in handwriting at the time of the signing.

Respondent Court and the People of the State of California, the latter being real party in interest, maintain that the method above-outlined of obtaining the Mays' and Whorleys' signatures to the respective dees of trust constitutes not only a violation of Penal Code, section 484, defining theft, but also constitutes "forgery," in violation of Penal Code, section 470.

Petitioner argues that he was not charged with forgery prior to the preliminary hearing, but that said charge appeared for the first time in the information filed in respondent Court. However, section 738 of the Penal Code provides that a defendant may be charged in the infomation with "any offense or offenses shown by the evidence taken before the magistrate to have been committed." Said offense need not have been charged in the complaint or designated in the order of commitment. (*People v. Griffin,* 106 Cal. App. 2d 531.) He maintains also that "there is absolutely no evidence in the transcript of the commission of the offense of forgery . . ."

Petitioner denies that he tricked the alleged victims into signing the deeds of trust, but places no emphasis on any claim that there is insufficient evidence in the record to legally support such a finding by the Municipal Court in binding the petitioner over. Petitioner does maintain, and places much emphasis on the point, that even though he should admit for the sake of argument that the alleged victims were tricked into signing the deeds of trust, this would not constitute theft under the provisions of Penal Code, sections 484 and 487, for the reason that the instrument itself, which was the object obtained through the trickery, has no ascertainable intrinsic value within the mean-

ing of those code sections. As the proposition is stated by the petitioner:

> "The scope of this Memorandum deals with the topic of whether a deed of trust given to secure a just debt or obligation has a value other than a mere intrinsic value, and more particularly whether such a deed of trust has an asecertainable extrinsic value within the meaning of California Penal Code Sections 484 and 487."

It is admitted by petitioner, solely for the sake of resolving this problem, that execution and delivery of the respective deeds of trust were obtained by petitioner through false representation and trickery. The finding of actual fact is for the trial court if this position is denied and the matter is brought to trial.

Respondent concedes the value of the physical instrument itself is negligible and that "obtaining a trust deed by false pretenses is not *grand* theft," but contends that "one is guilty of theft by false pretenses who induces another to part with property (a written promise to pay money for aluminum siding) in reliance on a false representation (that the agreement to pay the money will be unsecured)," does constitute theft. Respondent contends that, "the crime is complete at the moment the purchaser contracts in reliance on the misrepresentation," and that "It is immaterial that the victim receives what he bargained for and suffers no loss as a result of the transaction."

Respondent's theory is set forth in the return to the petition, as follows:

> "It is the theory of the People of the State of California that the actions and concealments of Pe-

titioner in denying to victims in Count III and concealing from victims in Count I that there would be a trust deed recorded against victims' property as a result of their purchase of aluminum siding constitutes obtaining money by false pretenses in violation of Penal Code section 484 (Theft). This theory is supported by the evidence of the representations and concealments of defendant, and his actions in having the victims sign the bottom of a sheaf of papers as duplicate contracts when the bottom sheets were instead trust deeds."

A deed of trust has no market or ascertainable value, apart from the obligation it secures. A trust deed merely hypothecates legal title and does not divest the trustor of his ownership in the property. (*Wyser v. Truitt,* 95 Cal. App. 727.) Where deeds to real property are obtained by fraud, there is no delivery or passage of title, and the deeds, being worthless, cannot be made the basis of a charge of grand theft. (*People v. Nye,* 96 Cal. App. 186, 190; *People v. Sewall,* 90 Cal. App. 476.) But here there was something more than an unauthorized taking of a written instrument. Under our facts, admitted for purposes of discussion, petitioner, by active misrepresentation and fraud in the one case and by concealment together with acts of active misrepresentation in the other, induced the victims to incur legal obligations in the sums of $6,000 each. They changed their legal positions as a result of fraudulent acts of commission and omission on the part of petitioner.

In *People v. Bryant,* 119 Cal. 595, 597, defendant sold the victim a promissory note for $500 secured by a deed of trust falsely representing to the victim that

the security was good tillable soil, the land of great value and sufficient as security for payment of the note. He was charged under section 532 of the California Penal Code with larceny. In reversing a judgment of the trial court sustaining a demurrer to the indictment, the court said:

> "If a person is induced to part with his property by reason of fraudulent pretenses and misrepresentations, he is thereby defrauded of the property so parted with, even though he may eventually make himself whole in some mode not then contemplated. It is not necessary to show that the property has been absolutely lost to him in order to sustain the charge. He is defrauded of his property when he is induced to part with it by reason of the false and fraudulent pretences and representations, and the offense is complete when by means of such false pretenses the fraud thereby intended is consummated by obtaining possession of the property sought. . . . 'If the false pretense was among the means by which he obtained the valuable thing, he has committed the full crime the same as though no other influence combined therewith.' "

The debt obligation here is admitted by the victims in each instance and it is not claimed by respondent that any portion thereof has been collected by recourse to the deeds of trust. But such a showing is not essential to the commission of the crime. in *People v. Talbott,* 65 Cal. App. 2d 654, 659, the court said:

> "It should be noted that the State of California is the plaintiff in a criminal action wherein the defendant is accused of an offense against the state. The victim is merely a witness whose ul-

timate financial gain or loss, in the circumstances, is immaterial. Financial loss is not a necessary element of the crime." (Citing *People v. Schmidt,* 147 Cal. App. 2d 222.)

Petitioner has confined his attention and argument primarily to the obtaining of the deed of trust and the possible consequences of a criminal nature which the law may properly impose upon such conduct. But there is other evidence which, if true, could reasonably be interpreted as amounting to false representation of fact with intent to defraud. Petitioner is charged with making certain false representations which induced the victims to sign the contract for installation of the aluminum siding by his employer, an instrument quite distinct and apart from the instrument which turned out to be a deed of trust signed in blank. With relation to the charge that petitioner fraudulently induced the victims to sign their respective contracts for installation of the aluminum siding, witness the following points and authorities.

It is not necessary in a prosecution for grand theft to prove that defendant benefited ***personally*** from the fraudulent act. (*People v. Jones,* 36 Cal. 2d 373, 377, 381; *People v. Ashley,* 42 Cal. 2d 246, 259.) While the false pretense or representation must have materially influenced the victim in parting with value, it need not be the sole inducing cause. (*People v. Chamberlain,* 96 Cal. App. 2d 178, 182; *People v. Ashley, supra,* page 259.) A single false representation is sufficient if it materially influenced the victim in parting with value. (*People v. Kassab,* 219 Cal. App. 2d 687, 690.) A contractual obligation to pay money is properly subject to the theft statutes (*People v. Frankfort,* 114 Cal. App.

2d 680, 703) and a written contractual obligation to pay in excess of $200 is properly of value in excess of $200, as contemplated by the definition of grand theft (*People v. Frankfort, supra).*

Petitioner in his briefs has discussed in some detail the evidence in the record and has suggested limitations upon the inferences to be drawn from it. This court is but little concerned with such questions. In considering the propriety of a motion to set aside an information pursuant to Penal Code, section 995, or in considering a petition for a writ of prohibition ordering a trial court to desist from further proceedings based upon such a petition, the reviewing court may not substitute its judgment as to the weight of the evidence for that of the committing magistrate. If there is some evidence in support of the information, the court will not inquire into its sufficiency. (*People v. Flanders,* 140 Cal. App. 2d 765, 768; *Perry v. Superior Court,* 57 Cal. 2d 276, 283.) Reasonable and probable cause may exist although there may be some room for doubt (*People v. Nagle,* 25 Cal. 2d 216, 222; *Perry v. Superior Court, supra,* page 283) and:

> "Although the magistrate, in reaching his decision, may weigh the evidence, resolve conflicts, and give or withhold credence to witnesses, such a balancing of the evidence is not within the powers of a tribunal reviewing the magistrate's order." (*Perry v. Superior Court, supra,* pp. 283-284.)

See also *People v. Jackson,* 146 Cal. App. 2d 553, 556.

As to the element of intent to defraud, petitioner argues that:

> ". . . nowhere has respondent shown that Petitioner was under a duty to verbally discuss the

subject of the trust deed with the prospective buyers. It is hereby contended by Petitioner that the lien contract signed by the Whorleys speaks for itself, and that Petitioner was under no duty to verbally discuss the terms of the contract, but rather was entitled to assume that unless the terms of the contract were questioned, that the buyers understood said terms, and that this failure to discuss the matter of the trust deed with the Whorleys cannot be considered as a concealment of a material fact, nor can it be considered fraud."

This contention by petitioner apparently relates to the fact that under the heading "Terms of This Contract" appears the following sentence:

"In addition to any other right or remedy given to the holder hereof, the undersigned hereby grants to the holder hereof, a deed of trust to the above described real property as security for the faithful performance of his, her or their obligation under this contract."

Petitioner also points to the statement in the contract that the buyer had read the contract and received a copy thereof. But intent to defraud is a question of fact to be determined from all the facts and circumstances of the case. It may be, and usually must be, inferred circumstantially. (*People v. Caruso,* 176 Cal. App. 2d 272, 278; *Perry v. Superior Court, supra,* 57 Cal. 2d 276, 285.) Whether there was or was not intent to defraud is not for this court to determine. Our function ends with a determination that from evidence in the record such an intent could reasonably be inferred.

Turning now to the two counts charging forgery, Penal Code, section 470, provides in part:

> "Every person who, with intent to defraud, . . . falsely makes, alters, forges, or counterfeits, any . . . deed, lease, indenture, writing obligatory, . . . or to let, lease, dispose of, alien, or convey any . . . lands, . . . or other estate, real or personal, . . . or . . . passes, or attempts to pass, as true and genuine, any of the above named . . . knowing the same to be false, altered, forged, or counterfeited, with intent to prejudice, damage, or defraud any person . . . is guilty of forgery."

In *People v. Nesseth,* 127 Cal. App. 2d 712, 719-720, the following statements appear:

> "That the correct rule is that the procuring of a genuine signature to an instrument by fraudulent representations constitutes forgery is supported by these well reasoned authorities: [citing many cases]
> . . .
> "Likewise, the rule is established in California that alteration of a document without authority with the intent to defraud may constitute forgery and that such alteration may consist of the *insertion of matter in the document in question after it has been signed. (People v. McKenna,* 11 Cal. 2d 327, 332 [79 P. 2d 1065]; *People v. Jones,* 100 Cal. App. 550, 554 [280 P. 555].") [Emphasis ours.]

Where a person who has no intention of selling or encumbering his property is induced by some trick or device to sign a paper having such effect, believing that paper to be a substantially different instrument,

the paper so signed is just as much a forgery as it would have been had the signature been forged. (*Conklin v. Benson,* 159 Cal. 785, 791; *Wright v. Rogers,* 172 Cal. App. 2d 349, 362.) An encumbrance may be the subject of forgery. (*Conklin v. Benson, supra,* page 792.) The crime of forgery is complete when one makes or passes an incorrectly named instrument with intent to defraud, prejudice, or damage, and proof of loss or detriment is immaterial. (*People v. McAffery,* 182 Cal. App. 2d 486, 493; *People v. Morgan,* 140 Cal. App. 2d 796, 800.) Whether the instrument forged has independent value is unimportant; the crime is complete when the act is done with the requisite intent.

From these cases and the quoted portion of Penal Code, section 470, it is quite apparent that evidence in the record of violation of the provisions of this section is ample to support the finding by the Municipal Court that ". . . a public offense has been committed. and there is sufficient cause to believe the defendant is guilty thereof . . ." (Pen. Code, §872.)

From the points and authorities discussed above, under the facts conceded here by petitioner for the sake of argument, and in the light of evidence in the record, the trial court properly denied petitioner's motion to set aside the information as to all counts.

Petition for writ denied.

Finley, *J. Pro tem.**

We Concur:

Coughlin, *Acting P. J.*

Brown, *J.*

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*Assigned by the Chairman of the Judicial Council.

Opinion of the District Court of Appeal. December 17, 1964.

In the District Court of Appeal, Fourth Appellate District, State of California.

William Buck, Petitioner v. The Superior Court of the State of California, Respondent. The People of the State of California, Real Party in Interest. 4 Civil No. 7841.

Filed, Dec. 17, 1964.

Petition for a writ of prohibition against the Superior Court of Orange County, under Penal Code, section 999a, to prevent that court from proceeding under information filed. Writ granted in part and denied in part.

Trope & Trope and Sorrell Trope for Petitioner.

Kenneth Williams, District Attorney of Orange County, and George J. Jeffries, Deputy District Attorney, for Respondent and Real Party in Interest.

Petitioner was arrested and charged with two counts of theft, in violation of Penal Code, sections 484 and 487. A preliminary hearing was held in the Municipal Court, Anaheim-Fullerton Judicial District, which hearing resulted in petitioner being held to answer in respondent Court. An information was filed therein by the District Attorney of Orange County, charging petitioner not only in two counts with theft, in violation of sections 484 and 487 of the Penal Code, but, in addition, also in two counts, with violation of Penal Code, section 470 (forgery). Petitioner moved respondent Court to set aside the information pursuant to the provisions of subdivision 2 of Penal Code, section 995, to wit:

> "That the defendant had been committed without reasonable or probable cause."

This motion was denied and the case was set for trial. Petitioner seeks from this court a writ of prohibition "demanding said court to desist from any further proceedings in said action."

Petitioner is an aluminum siding salesman. The charges here arose out of two separate sales of siding made by him. One sale was to a Mr. and Mrs. May, the other to a Mr. and Mrs. Whorley. In each sale, petitioner is alleged to have produced for signature of the parties a sheaf of forms consisting of a white top copy, under which there was a pink and yellow copy, all separated by carbon paper. The fourth and bottom paper, apparently a deed of trust form, was not separated from the third (yellow) copy by carbon paper. The top sheet contained the caption, "Lien Contract" and "Do Not Record." Just below this, in bracketed bold type, appears, among other admonitions, the following: "Notice to the buyer: (1) Do not sign this agreement before you read it or if it contains any blank space." Below this, in smaller type in the body of the instrument, appears this language: ". . . in addition to any other rights or remedy given to the holder hereof, the undersigned hereby grants to the holder hereof a deed of trust to the above described real property as security for the faithful performance of his, her or their obligation under this contract."

From testimony in the record, it appears that the question of the obligations being secured by deeds of trust on the respective properties was discussed and in each instance the parties told petitioner that they wanted no mortgage or trust deed encumbering their property and they received petitioner's assurance that there would be no deed of trust or mortgage. It seems, how-

ever, that after the Mays and the Whorleys had signed on the top sheet of their respective "Lien Contracts," petitioner pushed the bottom of the top three sheets up, exposing only the bottom of the fourth or last sheet which the parties were asked by petitioner to sign and did sign without seeing what appeared thereon above their signatures. It is charged that this last sheet was a deed of trust, the blanks of which had not been filled in at the time but were subsequently filled in by typewriter after the victims had been tricked into signing them, whereas the blanks on the lien contract forms were filled in in handwriting at the time of the signing.

Respondent Court and the People of the State of California, the latter being real party in interest, maintain that the method above outlined of obtaining the May's and Whorleys' signatures to the respective deeds of trust constitutes not only a violation of Penal Code, section 484, defining theft, but also constitutes "forgery," in violation of Penal Code, section 470.

Petitioner argues that he was not charged with forgery prior to the preliminary hearing, but that said charge appeared for the first time in the information filed in respondent Court. He maintains also that "there is absolutely no evidence in the transcript of the commission of the offense of forgery . . ."

Petitioner denies that he tricked the alleged victims into signing the deeds of trust, but places no emphasis on any claim that there is insufficient evidence in the record to legally support such a finding by the Municipal Court in binding the petitioner over. Petitioner does maintain, and placed all of his emphasis on the point, that even though he should admit for the

sake of argument that the alleged victims were tricked into signing the deeds of trust, this would not constitute theft under the provisions of Penal Code, sections 484 and 487, for the reason that the instrument itself, which was the object obtained through the trickery, has no ascertainable intrinsic value within the meaning of those code sections. As the proposition is stated by petitioner:

> "The scope of this Memorandum deals with the topic of whether a deed of trust given to secure a just debt or obligation has a value other than a mere intrinsic value, and more particularly whether such a deed of trust has an ascertainable extrinsic value within the meaning of California Penal Code Section 484 and 487."

It is admitted by petitioner, solely for the sake of resolving this problem, that execution and delivery of the respective deeds of trust were obtained by petitioner through false representation and trickery. The finding of actual fact is for the trial court if this position is denied and the matter is brought to trial.

The value of the physical instrument itself is negligible. The fact is not questioned, however, that the amounts which the respective deeds of trust purported to secure were in each instance in excess of the $200 specified in Penal Code, section 487.

Respondent's theory is set forth in the return to the petition, as follows:

> "It is the theory of the People of the State of California that the actions and concealments of Petitioner in denying to victims in Count III and concealing from victims in Count I that there would be a trust deed recorded against victims' property

as a result of their purchase of aluminum siding constitutes obtaining money by false pretenses in violation of Penal Code section 484 (Theft). This theory is supported by the evidence of the representations and concealments of defendant, and his actions in having the victims sign the botton of a sheaf of papers as duplicate contracts when the bottom sheets were instead trust deeds."

We do not agree that respondent's theory concerning theft is bourne out by the facts as they are made to appear. Petitioner actually obtained no money by false pretense. All he did obtain, under our accepted factual situation, was a transfer in trust of legal title to the real property to secure an admitted obligation. The parties have given us very little in the way of authority or discussion to assist us in deciding whether, under the law as it pertains to theft, petitioner obtained anything worth $200 or more which the victims had not intended.

A deed of trust has no market or ascertainable value, apart from the obligation it secures. A trust deed does not divest the trustor of his ownership in the property. (*Wyser v. Truitt,* 95 Cal. App. 727.) Where deeds to real property are obtained by fraud, there is no delivery or passage of title, and the deeds, being worthless, cannot be made the basis of a charge of grand theft. (*People v. Nye,* 96 Cal. App. 186, 190; *People v. Sewall,* 90 Cal. App. 476.)

The debt obligation itself is admitted by the victims in each instance and it is not claimed by respondent that any portion thereof has been collected by recourse to the deeds of trust. As yet, nothing of value has been taken from the victims through use of the

illegally obtained instruments. We therefore cannot find that the alleged depredations by petitioner which confront us here constitute theft. We are not faced with the problem as it would have been had petitioner obtained payment of all or part of the obligations through recourse to the deeds of trust.

Turning now to the two counts charging forgery, Penal Code, section 470, provides in part:

> "Every person who, with intent to defraud, . . . falsely makes, alters, forges, or counterfeits, any . . . deed, lease, indenture, writing obligatory, . . . or to let, lease, dispose of, alien, or convey any . . . lands, . . . or other estate, real or personal, . . . or . . . passes, or attempts to pass, as true and genuine, any of the above named . . . knowing the same to be false, altered, forged, or counterfeited, with intent to prejudice, damage, or defraud any person . . . is guilty of forgery."

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> "That the correct rule is that the procuring of a genuine signature to an instrument by fraudulent representations constitutes forgery is supported by these well reasoned authorities: [citing many cases] . . .
>
> "Likewise, the rule is established in California that alteration of a document without authority with the intent to defraud may constitute forgery and that such alteration may consist of the *insertion of matter in the document in question after it has been signed.* (*People v. McKenna,* 11 Cal. 2d 327, 332 [79 P. 2d 1065]; *People v. Jones,* 100 Cal. App. 550, 554 [280 P. 555].)" [Emphasis ours.]

Where a person who has no intention of selling or encumbering his property is induced by some trick or device to sign a paper having such effect, believing that paper to be a substantially different instrument, the paper so signed is just as much a forgery as it would have been had the signature been forged. (*Conklin v. Benson,* 159 Cal. 785, 791; *Wright v. Rogers,* 172 Cal. App. 2d 349, 362.)

From these cases and the quoted portion of Penal Code, section 470, it is quite apparent that the evidence in the record is ample to support the finding by the Municipal Court that ". . . a public offense has been committed, and there is sufficient cause to believe the defendant is guilty thereof . . ." (Pen. Code §872.)

The charge of "theft," in violation of Penal Code, sections 484 and 487, as charged in two counts of the information, does not, however, from the standpoint of the legal definition, find such support in the record, and as to these two counts the writ is hereby granted. As to the two counts of forgery, the writ is hereby denied.

Finley *J. Pro tem.**

We Concur:

Griffin *P. J.*

Coughlin *J.*

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*Assigned by the Chairman of the Judicial Council.